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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAR - 9 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Petition of

STATE OF MINNESOTA

CC Docket No. 98-1

For a Declaratory Ruling Concerning
Access to Freeway Rights-of-Way
Under Section 253 of the
Telecommunications Act of 1996

To: The Commission

COMMENTS OF MIDWEST WIRELESS COMMUNICATIONS, L.L.C.

Midwest Wireless Communications, L.L.C. ("Midwest Wireless"), by its attorneys and pursuant to the Commission's Public Notice, DA 98-32 (Jan. 9, 1998), hereby submits its comments in opposition to the petition of the State of Minnesota ("State") for a ruling declaring that the State's proposal to grant a wholesale provider of fiber optic transport capacity exclusive access to state freeway rights-of-way is consistent with section 253 of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 253. ¹/

Midwest Wireless is the licensee of cellular radiotelephone systems serving the Rochester, Minnesota MSA and five Minnesota RSAs. It is a potential user of any statewide fiber optic system installed in the State's freeway rights-of-way. As such, Midwest Wireless is interested in the ready availability of fiber capacity from competing providers at low market prices. That interest will not be served by the State's plan to grant exclusive access to its

¹/ See Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, CC Docket No. 98-1 (Jan. 5, 1998) ("Petition").

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rights-of-way to a single provider.

The State provided the Commission with the opposing views of the Minnesota Telephone Association ("MTA"). See Petition at Exs. 1, 3. Midwest Wireless concurs with the MTA's legal analysis. Therefore, it will confine its comments to a few points not stressed by the MTA.

Under the Agreement to Develop and Operate Communications Facilities ("Agreement"), the team of ICS/UCN LLC and Stone & Webster Engineering Corporation ("Developer") will provide wholesale fiber optic transport capacity, both "lit" and "dark", for sale or lease. See Petition at 1, 14. That being the case, the State cannot seriously contend that the Agreement does not involve "telecommunications service" within the meaning of section 253(a) of the 1996 Act. See *id.* at 16.

The Commission views lit fiber service as a "fiber optic transmission service" while dark fiber service is the provision of "fiber optic transmission capacity". *Southwestern Bell Telephone Co.*, 8 FCC Rcd 2589, 2589 & n.1 (1993), *remanded for reconsideration*, *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). Customers of either service can "transmit intelligence of their own design and choosing". See *id.* 19 F.3d at 1480-81. Therefore, the provision of lit and dark fiber by the Developer would involve "telecommunications" as it was defined by the 1996 Act. See 47 U.S.C. § 153(43).

The Developer certainly contemplates providing a "telecommunications service". See 47 U.S.C. § 153(46). Even if it is "con-

tractually restrained" to wholesale fiber transport capacity, see Petition at 14, and acts only as a "carrier's carrier", see *id.* at 4, the Developer will still be offering telecommunications "for a fee directly to the public, or to such classes of users as to be effectively available to the public", 47 U.S.C. § 153(46). The Commission has interpreted the phrase "directly to the public" to encompass services offered primarily to other carriers, including "carrier's carrier" services. See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78 & n.2011 (1997) (citing *MTS and WATS Market Structure*, 93 FCC 2d 241, 249-50 (1983)).

The Commission has held that the statutory definition of telecommunications service is "intended to clarify that telecommunications services are common carrier services." *Cable & Wireless, PLC*, 12 FCC Rcd 8516, 8521 (1997). And it appears that the Developer will be treated as a common carrier under the familiar two-part test for common carriage. ^{2/}

First, the Developer will be under legal compulsion to "serve all indiscriminately", *NARUC I*, 525 F.2d at 641, which is the key element of common carriage, *Beehive Telephone, Inc. v. The Bell Operating Companies*, 10 FCC Rcd 10562, 10564-65 (1995), *reaffirmed*,

^{2/} See *Southwestern Bell*, 19 F.3d at 1480; *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1471 n.10 (D.C. Cir. 1984); *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-9 (D.C. Cir. 1976) ("*NARUC II*"); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 & n.58 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*").

12 FCC Rcd 17930 (1997). The Developer's contract with the State requires it to make fiber transport capacity "available to all similarly situated customers at non-discriminatory rates and charges". Petition at 10.

Second, because "fiber customers transmit intelligence of their own design", *Southwestern Bell*, 19 F.3d at 1481, the Developer will meet the "second prerequisite" to common carrier status, *NARUC II*, 533 F.2d at 609. Thus, the Developer is likely to provide interstate or intrastate telecommunications services and be treated as a common carrier. See 47 U.S.C. § 153(44).

The State is incorrect when it suggests that the provision of "[w]holesale transport capacity is not a telecommunications service typically regulated by the Commission." Petition at 14. By providing lit fiber service, and possibly dark service, the Developer will be subject to regulation under title II of the Communications Act of 1934, as amended ("Act"), including the Commission's authority under section 214 of the Act, 47 U.S.C. § 214. See *Southwestern Bell*, 8 FCC Rcd at 2595-2600.

Not only will the Developer be subject to the Commission's jurisdiction, but the State has used its "contracting authority" to empower its Department of Transportation (or its Department of Administration) to regulate the Developer's telecommunications services. See Petition at 25. For example, under section 7.7(b) of the Agreement, the Developer must file written schedules of its rates and charges which the State will publish. See *id.*, Ex. 5 at VII-6-7. If those schedules show that it is charging discriminatory

rates, the Developer will be in default under section 16.1(c) of the Agreement, and subject to the remedies provided the State under section 16.3(b). In effect, the Developer will be contractually subject to a form of tariff regulation.

However well intentioned, the State's attempt to protect against anticompetitive conduct has led it to go beyond "traditional rights-of-way matters" to impose a "third tier" of telecommunications regulation. *TCI Cablevision of Oakland County, Inc.*, 9 Com. Reg. (P&F) 730, 758 (1997). To that extent, the State's plan is wholly inconsistent with the deregulatory policies of the 1996 Act and deserves "close scrutiny" by the Commission. See *id.* at 758-59.

We suggest that the Agreement on its face violates section 253(a) of the 1996 Act. The exclusivity feature of the Agreement ensures that it will "materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment". *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California*, 12 FCC Rcd 14191, 14206 (1997). The dispositive fact is that no other telecommunications carrier will be able to construct a statewide fiber optic network in concert with the State and with access to its freeway rights-of-way. Indeed, the prospect of competing with a State-backed carrier is enough to "inhibit" entry into the wholesale fiber optic market.

Section 253(b) of the 1996 Act cannot save the Agreement unless it is "(i) 'competitively neutral'; (ii) consistent with the [1996] Act's universal service provisions; and (iii) 'necessary' to

accomplish certain enumerated public interest goals." *Silver Star Telephone Co., Inc.*, 12 FCC Rcd 15639, 15657 (1997) (emphasis added). Obviously, the Agreement favors the Developer and cannot be deemed "competitively neutral". Moreover, the arrangement is not "necessary" to "safeguard the rights of consumers" or to "protect the public safety or welfare." 47 U.S.C. § 253(b); *New England Public Communications Council*, 11 FCC Rcd 19713, 19722 (1996), *reconsideration denied*, 12 FCC Rcd 5215 (1997). The Agreement is intended simply to give the State a free "share of the lit and dark capacity of the Developer's network". Petition at 1.

Nor can the State find refuge in section 253(c) of the 1996 Act which protects the right of a state government to "manage the public rights-of-way". 47 U.S.C. § 253(c). "The types of activities that fall within the sphere of appropriate rights-of-way management include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes and keeping track of the various systems using the rights-of-way to prevent interference between them." *Classic Telephone, Inc.*, 12 FCC Rcd 15619, 15637 n.102 (1997). The State's attempt here to swap exclusive access to its freeway rights-of-way for free or reduced-rate (at 80% of the Developer's "most favored" customers' rates and charges) telecommunications service ^{3/} goes far beyond appropriate rights-of-way management. Therefore, the State's "barter" arrangement cannot be

^{3/} See Petition, Ex. 5 at III-5, 6.

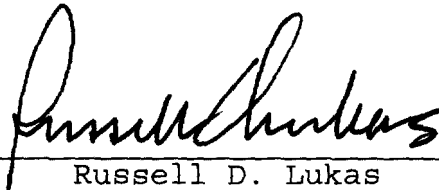
protected by section 253(c).

For all the foregoing reasons, Midwest Wireless respectfully requests the Commission to deny the Petition, declare the Agreement to be unlawful, and preempt its enforcement under 47 U.S.C. § 253(d).

Respectfully submitted,

MIDWEST WIRELESS COMMUNICATIONS, L.L.C.

By



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March 9, 1998

CERTIFICATE OF SERVICE

I, Katherine A. Baer, a secretary in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 9th day of March, 1998, sent by first class United States mail, copies of the foregoing COMMENTS to the following:

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